IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 102 EM 2018

JERMONT COX,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

COMMONWEALTH'S BRIEF FOR RESPONDENT

JOANNA H. KUNZ
Assistant District Attorney
GRADY GERVINO
Assistant District Attorney
MICHAEL ERLICH
Assistant District Attorney
PAUL M. GEORGE
Assistant Supervisor, Law Division
NANCY WINKELMAN
Supervisor, Law Division
LAWRENCE S. KRASNER
District Attorney of Philadelphia

Three South Penn Square
Philadelphia, PA 19107
(215) 686-5700
nancy.winkelman@phila.gov

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II. Does Article I, Section 13 of the Pennsylvania Constitution prohibit the imposition of the death penalty independently of the Eighth Amendment of the Federal Constitution?

III. Should this Court exercise its King's Bench jurisdiction to consider whether the death penalty, as applied, violates the Pennsylvania Constitution's ban on cruel punishments?

INTRODUCTION

When the United States Supreme Court approved the reinstatement of capital punishment in 1976, it did so with the cautionary recognition that, because "death is qualitatively different from a sentence of imprisonment, however long[,] . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). Since that initial proclamation, the Court has consistently recognized that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

In 1978, in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), Pennsylvania enacted a new capital punishment statute. Four years later, this Court upheld that statute, determining that the legislation "diligently attempted" to prevent the "wanton and freakish, arbitrary and capricious" imposition of the death penalty. *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 949-51 (Pa. 1982). Significantly, when this Court decided *Zettlemoyer*, Pennsylvania had limited experience with the new law.

Now, based upon the nearly forty years of ensuing capital litigation, this Court is well equipped to judge whether Pennsylvania's death penalty, as it has been applied, violates the state Constitution's ban on cruel punishments.

To assess whether Pennsylvania's capital sentencing regime ensures the heightened reliability in capital cases required by our Constitution, there is no better place to start than Philadelphia—the jurisdiction that has sought and secured more death sentences than any other county in the state. In order to formulate its position in this case, the Philadelphia District Attorney's Office (DAO) studied the 155 cases where a Philadelphia defendant received a death sentence between 1978 and December 31, 2017.[1]

As will be detailed below, the DAO study revealed troubling information regarding the validity of the trials and the quality of representation received by capitally charged Philadelphia defendants—particularly those indigent defendants who were represented by under-compensated, inadequately-supported court-appointed trial counsel (as distinguished from attorneys with the Defender Association of Philadelphia). Our study also revealed equally troubling data regarding the race of the Philadelphia defendants currently on death row; nearly all of them are black. Most of these individuals were also represented by court-

[1] The DAO did not include three types of Philadelphia capital cases: (1) cases where the capital aspect was resolved *after* the current District Attorney assumed office on January 2, 2018; (2) a small number of cases where the capitally sentenced Philadelphia defendant died of natural causes before the resolution of his appeals; and (3) *Commonwealth v. Gary Heidnik*, CP-51-CR-0437091-1987, the only Philadelphia defendant who has been executed since 1978, after he filed no post-conviction appeals and volunteered for execution.

appointed counsel, often by one of the very attorneys whom a reviewing court has deemed ineffective in at least one other capital case.

In summary (as detailed *infra* in the statement of the case and accompanying appendix), the DAO study revealed the following:

- **Philadelphia Death Cases Overturned on Post-Conviction Review**

1. **72%** of the 155 Philadelphia death sentences (**112 out of 155**) were overturned at some stage of post-conviction review.

2. **66%** of the 112 overturned death sentences (**74 out of 112**) were overturned due to the ineffective assistance of trial counsel. (This brief will refer to such cases as "IAC cases").

3. In **78%** of the 74 IAC cases (**58 out of 74**), the Philadelphia defendant was represented by court-appointed counsel—i.e., an attorney selected by the court to represent an indigent defendant.

4. In **51%** of the 74 IAC cases (**38 out of 74**), the reviewing court specifically based its ineffectiveness determination on trial counsel's failure to prepare and present a constitutionally acceptable mitigation presentation.

5. In **82%** of the 38 IAC cases that were overturned because trial counsel failed to prepare and present mitigation (**31 out of 38**), the defendant was represented by court-appointed counsel.

- **The Outcome of Cases Overturned on Post-Conviction Review**

1. In **91%** of the 112 overturned Philadelphia death sentences (**102 out of 112**), the defendant ultimately received a final, non-capital disposition.

2. In **64%** of the of the 102 overturned death sentences where the defendant received a final, non-capital sentence (**65 out of 102**), the Commonwealth ultimately agreed to a final, non-capital disposition. (None of these agreements occurred during the administration of the current Philadelphia District Attorney.)

3. For the 112 defendants whose death sentences were overturned, the average length of time between arrest and the resolution of the capital aspect of their cases was **17 years**.

4. During those 17 years of litigation, nearly all of the professional participants—judges, prosecutors, and defense attorneys—were funded by tax dollars.

- **Philadelphia Defendants Who Remain on Death Row**

1. **45** Philadelphia defendants remain on death row.

2. **91%** of the Philadelphia defendants currently on death row (**41 out of 45**) are members of racial minority groups.

3. **82%** of the Philadelphia defendants currently on death row **(37 out of 45)** are black. Less than 45% of Philadelphia's population is black.

4. **80%** of the Philadelphia defendants currently on death row (**36 out of 45**) were represented by court-appointed trial counsel—i.e., an attorney selected by the criminal justice system to represent an indigent defendant.

5. **62%** of the currently death-sentenced Philadelphia defendants (**28 out of 45**) were represented by an attorney whom a reviewing court found to be ineffective in at least one other Philadelphia capital case.

The DAO believes that these facts call into question the constitutionality of the death penalty as it has been applied in the county where it has been most actively employed. To be clear: the problem is not with the statute, but rather with its application. Despite the General Assembly's efforts to craft a statute that comports with constitutional standards, a 72% reversal rate shows that death sentences have been applied "in a wanton and freakish, arbitrary and capricious manner."

Zettlemoyer, 454 A.2d at 949 (citing *Furman*, 408 U.S. at 310). This violates the state Constitution's ban against cruel punishments.[2]

Where nearly three out of every four death sentences have been overturned—after years of litigation at significant taxpayer expense—there can be no confidence that capital punishment has been carefully reserved for the most culpable defendants, as our Constitution requires. Where a majority of death sentenced defendants have been represented by poorly compensated, poorly supported court-appointed attorneys, there is a significant likelihood that capital punishment has not been reserved for the "worst of the worst." Rather, what our study shows is that, as applied, Pennsylvania's capital punishment regime may very well reserve death sentences for those who receive the "worst" (i.e., the most poorly funded and inadequately supported) representation. Indeed, of the 155 Philadelphia death sentences studied here, **152** (**98%**) were imposed during a period when court-appointed counsel received a flat fee described as "woefully inadequate" by a

[2] The DAO's position in this litigation does not affect this DAO Administration's policy for the review of death and death-eligible cases. The DAO's policy is for a committee of highly experienced supervisory personnel to carefully review the facts and law with regard to death and death-eligible cases, and then to make a recommendation to the District Attorney whether to seek or continue to seek the death penalty in each particular case. The District Attorney, in turn, exercises the full and sole prosecutorial discretion afforded to him by law whether to seek the death penalty based on a careful, case-by-case review of each case.

Special Master this Court appointed to report on Philadelphia's capital case fee structure.

Our criminal justice system does not work by process of elimination. We do not over-convict and trust that justice will be done through the appeals process. Instead, at least in theory, our system strives for the opposite—it provides robust protections to criminal defendants throughout the pre-trial and trial stages and then gives deference to the outcomes obtained at trial. Hallmarks of the system include deference to the trial judge, to jury verdicts, to defense attorney strategy, and to prosecutorial discretion. For that deference to be appropriate, the trial process must be reliable. A 72% error rate is not.

Moreover, our system depends on the finality of judgments. Both the retributive and deterrent functions of the criminal justice system fail without that finality—with repeated negative impact on victims, their families, and society at large. In Pennsylvania, the protracted post-conviction process consumes incalculable public resources, resulting in a substantial number of non-death sentences (i.e., exactly where the cases would have been at the beginning, if they had never been capital) and leaving the existing sentences—all of which remain in some stage of active post-conviction review—under a cloud of unreliability. This runs contrary to the core missions of the DAO—to resolve criminal cases swiftly

and reliably, to increase public safety, and to protect victims from re-traumatization during the ensuing decades of post-conviction proceedings.

As this Court observed in *Zettlemoyer*, our 1978 statute attempted to establish a reliable, non-arbitrary system of capital punishment. Decades of data from Philadelphia demonstrates that, in its application, the system has operated in such a way that it cannot survive our Constitution's ban on cruel punishment. Accordingly, the DAO respectfully requests this Court to exercise its King's Bench or extraordinary jurisdiction and hold that the death penalty, as it has been applied, violates the Pennsylvania Constitution.

STATEMENT OF JURISDICTION

This Court may exercise King's Bench jurisdiction "to minister justice to all persons and to exercise the powers of the court, as fully and amply, to all intents and purposes, as the justices of the Court of King's Bench, Common Pleas and Exchequer, at Westminster, or any of them, could or might do on May 22, 1722." 42 Pa.C.S. § 502; *see* Pa. Const. Art. V, § 2. "King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Commonwealth v. Williams*, 129 A.3d 1199, 1206 (Pa. 2015) (citing *In re Bruno*, 101 A.3d 635, 670 (Pa. 2014)). As will be more thoroughly discussed in Argument, Section III below, this is such an issue.

STATEMENT OF THE CASE: THE DAO STUDY

To determine how the death penalty has been applied, the DAO studied the 155 death sentences that were imposed in Philadelphia between 1978 and December 31, 2017. A small group of Philadelphia capital cases has been excluded from this survey: (1) cases where the capital aspect was resolved after the current District Attorney assumed office on January 2, 2018; (2) a small number of cases where the capitally sentenced Philadelphia defendant died of natural causes before the resolution of his appeals; and (3) *Commonwealth v. Gary Heidnik*, CP-51-CR-0437091-1987, the only Philadelphia defendant who filed no post-conviction appeals and was executed.

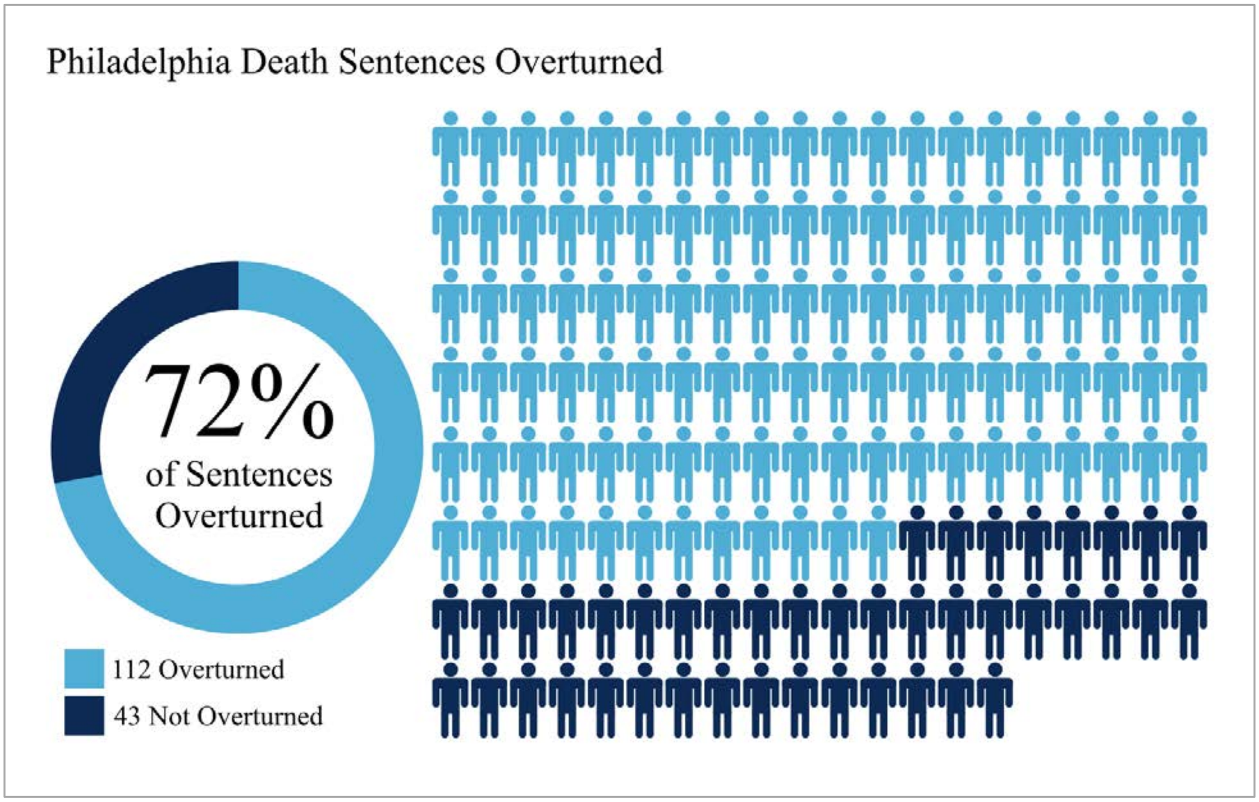
We divide our analysis of these 155 capital cases into two sections. Section I evaluates **112** cases (i.e., **72%** of the total) where a reviewing court overturned a Philadelphia defendant's death sentence prior to December 31, 2017. Section II addresses the **45** Philadelphia defendants who remain sentenced to execution.[3] We then provide an overview of the history of funding for court-appointed counsel in

[3] Although there are 112 overturned cases and 45 Philadelphia defendants housed on death row, the DAO Study analyzes a total of 155 cases, rather than 157. This is because in two Philadelphia cases, the defendant remains on death row even though a federal district court has ordered penalty phase relief. *Commonwealth v. Fahy*, CP-51-CR-0222831-1981 (Third Circuit Court of Appeals holding case in abeyance; cross-appeals pending); *Commonwealth v. Porter*, CP-51-CR-0622491-1985 (cross-appeals pending before Third Circuit Court of Appeals).

capital cases (Section III), as well as a brief discussion of other considerations affecting capital sentences (Section IV).

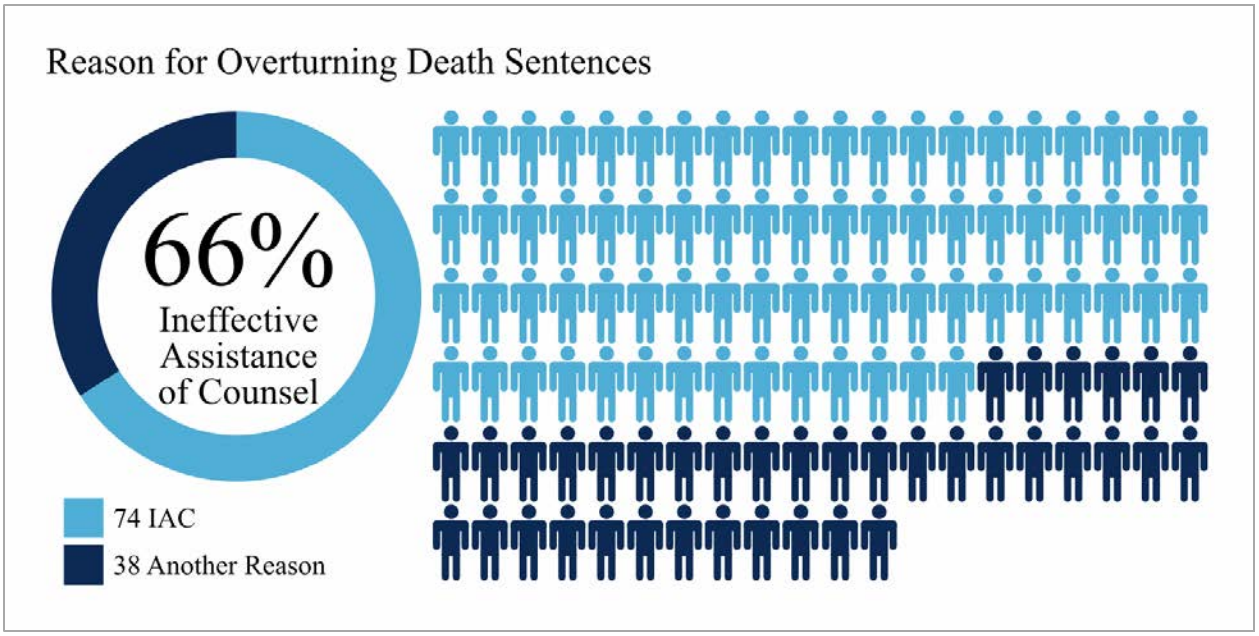
I. Death Sentences Overturned During Post-Conviction Review

During post-conviction proceedings, a reviewing court has overturned **112** (**72%**) of the 155 Philadelphia death sentences.



A. Death sentences overturned due to ineffective assistance of counsel

A reviewing court overturned **74** of the 112 overturned Philadelphia death sentences due to ineffective assistance of counsel (IAC). Put another way, **66%** (two out of every three) of the 112 overturned death sentences resulted from ineffective assistance.



Accordingly, nearly half (**48%**) (74 out of 155) of the Philadelphia death sentences have been overturned as a result of ineffective assistance.[4]

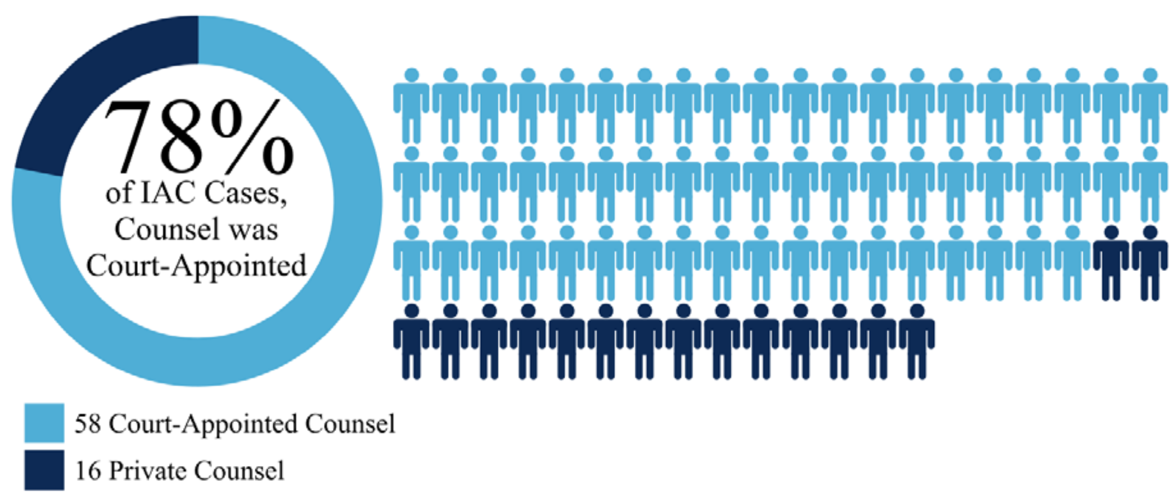
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[4] Part I(A)(1) of the DAO Appendix lists the 74 cases where a reviewing court overturned a Philadelphia death sentence due to ineffective assistance of counsel (IAC). For each IAC case, Part I, Section A identifies:

a. The nature of the ineffectiveness claim;
b. The relief granted (new trial or new sentencing hearing);
c. Whether the case ultimately had a non-capital outcome;

Court-appointed counsel represented the defendant in **58** of the 74 cases where a capitally sentenced Philadelphia defendant received post-conviction relief due to ineffective assistance.[5] In other words, in **78%** (three out of every four) of the IAC cases, the ineffective lawyer was an attorney selected by the court for an indigent defendant.[6]

Court-Appointed Counsel in Ineffective Assistance Cases



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d. The duration of litigation from the date of arrest to non-capital resolution; and

e. Whether court-appointed counsel represented the defendant at the trial stage.

[5] Part I, Section A, Subsection 2 of the DAO Appendix lists the 58 IAC cases where a Philadelphia defendant had court-appointed counsel.

[6] We note that attorneys from the Defender Association of Philadelphia did not represent any of the defendants in these 58 IAC cases. Prior to 1992, the Philadelphia Court of Common Pleas did not appoint Defender Association attorneys to capital cases. After that time, one out of every five capitally charged

In **38** of the 74 IAC cases **(51%)**, the sentence was overturned due to trial counsel's failure to prepare and present available mitigation evidence at the penalty phase.[7] The defendant had court-appointed counsel in **31 (82%)** of these 38 cases.

B. Death sentences overturned on other grounds

In the **38** other of the 112 overturned cases, a reviewing court overturned a Philadelphia death sentence on grounds *other* than the ineffective assistance of counsel. These cases were overturned on the following grounds: (a) trial court error (*Total 16*); (b) prosecutorial misconduct (*Total 10*); (c) changes in the law (*Total 8*); (d) actual innocence (*Total 1*); and (e) reasons not specified in the available Docket Entries (*Total 3*).[8]

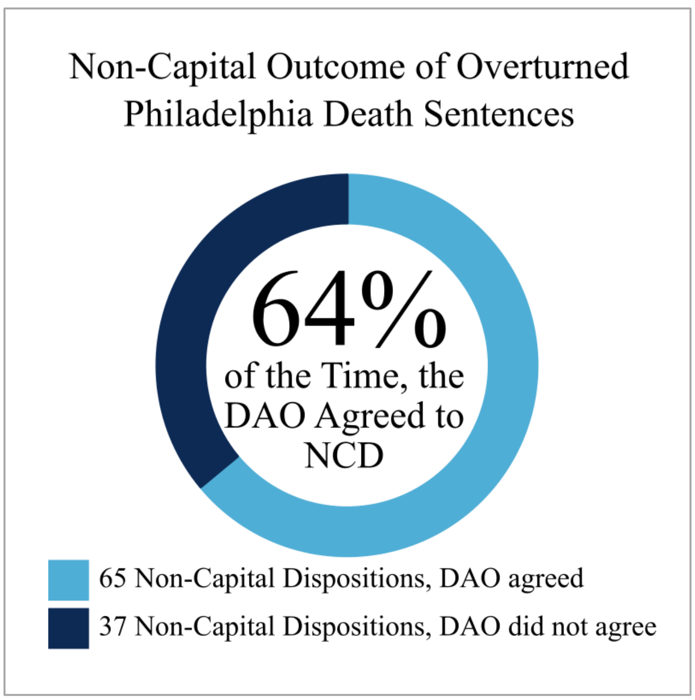
Philadelphia defendants receives representation from the Defender Association. None of the Defender Association defendants has received a death sentence.

[7] Part I, Section A, Subsection 3 of the DAO Appendix lists the 38 IAC cases that were overturned due to trial counsel's failure to prepare and present available mitigation evidence.

[8] Part I, Section B of the DAO Appendix, lists the 38 cases where a reviewing court overturned a Philadelphia death sentence on other grounds.

C. Non-capital outcome of overturned death sentences

After remand and subsequent proceedings, **none** of the 112 overturned Philadelphia death cases resulted in the execution of the defendant. To the contrary, **102** (**91%**) of the 112 overturned cases ultimately resulted in a final, non-capital disposition.[9] In **65** of these 102 cases (**64%**) the DAO **agreed** to a non-capital disposition, even though the DAO had the option of retrying the guilt and/or penalty phase of the defendant's trial. (Again, none of the cases in the DAO study occurred under the current DAO administration.)[10]



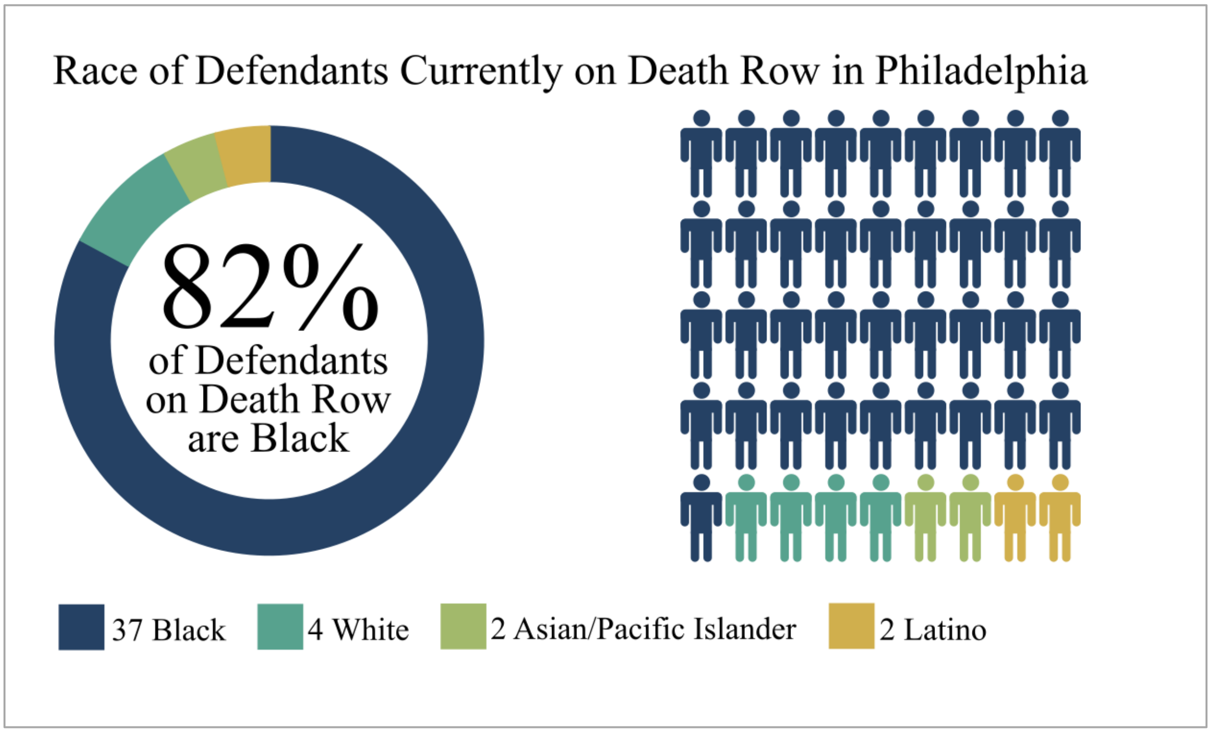
[9] Part I, Section C of the DAO Appendix lists the 102 formerly capital cases that ultimately resulted in a non-capital disposition.

[10] Part I, Section D of the DAO Appendix lists the 65 formerly capital cases where the Commonwealth ultimately agreed to a non-capital disposition.

The average length of time between arrest and the ultimate non-capital disposition was **17 years**.[11]

II. Cases Where a Philadelphia Defendant Remains Sentenced To Death

There are currently 45 Philadelphia defendants on death row. **91% (41 out of 45**) of these defendants are members of a racial minority group. **37** (**82%**) are black.[12]



[11] Part I, Section E of the DAO Appendix lists the length of time, for each of the formerly capital cases, between the time of arrest and the time of non-capital resolution.

[12] Part II, Section A of the DAO Appendix lists the race of the Philadelphia defendants who remain on death row. The Department of Corrections website lists the race of each defendant on death row under "Persons Sentenced to Execution in Pennsylvania as of November 1, 2018."

36 (**80%**) of the 45 Philadelphia defendants currently on death row were represented by court-appointed trial counsel. **28** (**62%**) of these defendants were represented by an attorney whom a reviewing court found to be ineffective in at least one other Philadelphia capital case.[13]

29 (78%) of the 37 black defendants currently sentenced to death were represented by court-appointed counsel.

III. History of Funding and Training in Philadelphia for Court-Appointed Counsel in Capital Cases

Between 1980 and 2012—the period during which 152 of the 155 Philadelphia capital convictions examined here occurred—the compensation for court-appointed counsel in Philadelphia was "woefully inadequate" and "unacceptably increase[d] the risk of ineffective assistance of counsel." Report and Recommendations, *Commonwealth v. McGarrell*, 77 E.M. 2011, 2012 Pa. LEXIS 2854, at *2-*3, *17 (C.P. Phila. Cnty. Feb. 21, 2012) ("Lerner Report").

In 2011, this Court appointed Judge Benjamin Lerner to study the issue of compensation for court-appointed counsel in Philadelphia capital cases. As his

[13] Part II, Section B of the DAO Appendix lists the Philadelphia defendants on death row who were represented by court-appointed counsel. Part II, Section C lists the Philadelphia defendants currently on death row who were represented by a court-appointed attorney who was found to be ineffective in at least one other Philadelphia capital case.

subsequent report explained, during the period between 1980 and 2012, the Philadelphia Court of Common Pleas paid court-appointed attorneys $1800 to prepare a capital case, and a per diem trial rate of $400. *Id.* at *17. The pretrial compensation was a flat fee, which remained constant no matter how many—or how few—hours an attorney expended in preparation. *Id.* In other words, if counsel diligently researched mitigation and spent hours interviewing the defendant's family, acquiring social history records, and consulting with experts, counsel received the same payment as an attorney who did nothing to prepare for the penalty phase. (As noted above, in **38 (51%)** of the 74 IAC cases, the subsequent ineffectiveness determination was specifically based upon trial counsel's failure to prepare a constitutionally acceptable mitigation presentation. Court-appointed counsel represented the capitally charged defendant in **31 (82%)** of the 38 IAC cases that were overturned because trial counsel failed to prepare and present constitutionally adequate mitigation.)

As Judge Lerner explained, Philadelphia's "woefully inadequate" system for compensating capital defense counsel was "completely inconsistent with how competent trial lawyers work." *Id.* In fact, the system actually "punishe[d]" counsel for properly handling death penalty cases. *Id.* at *27. Specifically, the Philadelphia compensation system provided a financial incentive for an attorney to engage in minimal pretrial preparation and encouraged the attorney to take the case to trial,

even though for most capitally charged defendants the best outcome is often a non-trial resolution. *Id.* at *17-*18, *27. In fact, if a capital case resulted in a negotiated guilty plea and life sentence, the court-appointed attorney would not only *not* receive any compensation beyond the original flat fee payment, but even that payment would be reduced by a third. *Id.* at *17.

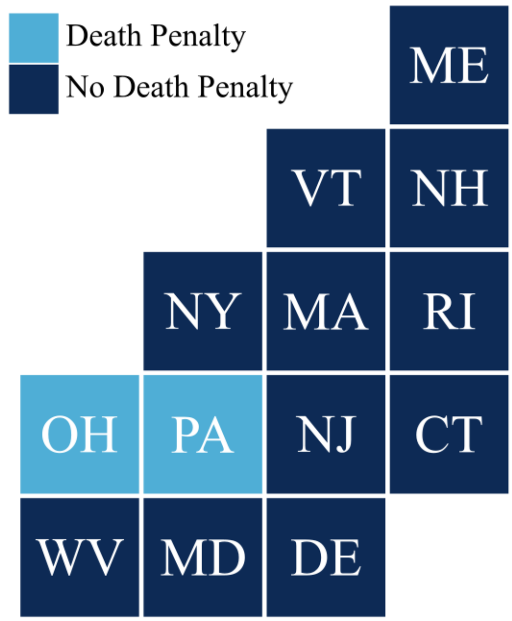
IV. Other Considerations Affecting Capital Sentences

Our study revealed other factors that enhance the risk of unreliability in the administration of capital punishment. These factors include changes in the law that affect eligibility for death sentences and the racial makeup of the Philadelphia defendants who are currently sentenced to death.

A. Our neighboring states

As a threshold matter, we note that simple geography demonstrates that there is no compelling penological justification for the death penalty. Of Pennsylvania's immediate neighbors, only one of them, Ohio, maintains the death penalty. All the northeastern states and all of the other states that border Pennsylvania prohibit the death penalty.

The Death Penalty in 13 States in Northeastern United States



Pennsylvania and Ohio stand alone among the 13 northeastern or Pennsylvania-contiguous states in still allowing the imposition of the death penalty.

Yet no one can seriously contend that, in any measurable way, Pennsylvania does a better job combatting crime and providing justice than most of its regional neighbors. *See, e.g.*, FBI, Uniform Crime Reporting, 2017 Crime in the United States, Table 4, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/additional-data-collections/federal-crime-data/table-4/at_download/file (last visited June 17, 2019) (showing that in 2017, the last year for which statistics are

available, Pennsylvania had a higher homicide rate than eleven of its twelve regional neighbors, all but one of which do not have the death penalty).

B. Changes in the law affecting death sentences

Since 1978, the United States Supreme Court has determined that two classes of individuals—juveniles and the intellectually disabled—may not be executed. *Roper v. Simmons,* 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002). Those newly recognized constitutional limits on capital punishment apply retroactively.

Several defendants have received the benefit of those retroactive changes because, fortuitously, their cases remained in post-conviction review when the United States Supreme Court recognized the new constitutional prohibition on capital punishment.[14] But for those unrelated delays, several juvenile defendants and intellectually disabled defendants might have been executed before the high court determined that they were constitutionally ineligible for the death penalty. *See Furman*, 408 U.S. at 290 (Brennan, J., concurring) ("[W]e know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court.").

[14] Six Philadelphia intellectually disabled defendants received penalty phase relief under *Atkins v. Virginia*, 536 U.S. 304 (2002). Two Philadelphia juvenile defendants received penalty phase relief under *Roper v. Simmons*, 543 U.S. 551 (2005). (DAO Appendix, Part I, Section B).

Future changes in the law might well further limit the class of individuals who are eligible for execution. For example, based upon the scientific studies relied upon in *Roper* and *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017), some have argued that defendants who were 18 or 19 years old at the time of their offenses are constitutionally ineligible. Indeed, in light of newly available research, our Superior Court has "urged" this Court to review the eligibility of adult teenagers for a mandatory life sentence. *See Commonwealth v. Lee*, 206 A.3d 1, 11 n.11 (Pa. Super. 2019) (en banc).

C. Racial makeup of Philadelphia defendants on death row

Less than 45% of Philadelphia's population is black.[15] 82% of the Philadelphians on death row are black. Of the remaining eight, half are from other minority groups. (DAO Appendix II, Section A).

In a system as complex as ours, isolating the exact reasons for this disparity may be impossible. At a minimum, we know that the vast majority of Philadelphia's death row defendants were indigent and were assigned court-appointed counsel, including many of the same counsel deemed ineffective in other capital cases. (DAO Appendix, Part II, Section A). We also know that racial minorities make up the

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[15] U.S. Census Bureau, QuickFacts Philadelphia County, Pennsylvania, https://www.census.gov/quickfacts/philadelphiacountypennsylvania#qf-headnote-a (last visited June 17, 2019).

greatest share of Philadelphia's poor.[16] Thus, at least one contributing factor may be that minorities have disproportionately depended on court-appointed counsel, who have, in turn, historically provided ineffective assistance at alarming rates in Philadelphia capital cases.

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16 *Philadelphia's Poor*, Pew Charitable Trusts Report (Nov. 2017), https://www.pewtrusts.org/-/media/assets/2017/11/pri_philadelphias_poor.pdf (last visited June 17, 2019).

SUMMARY OF ARGUMENT

Today, this Court possesses decades of experience with modern-day capital punishment. The DAO study undertaken in connection with this litigation shows how Pennsylvania's capital punishment system has been applied in Philadelphia—the county that has produced the most death sentences. That study reveals that the majority (72%) of Philadelphia death sentences have been overturned, most commonly because under-funded, inadequately supported court-appointed counsel failed to prepare a constitutionally acceptable mitigation presentation. Most of those overturned cases have resulted in final, non-capital dispositions, often with the agreement of the same prosecutor's office that originally sought death. This results in a system that lacks reliability. Because of the arbitrary manner in which it has been applied, the death penalty violates our state Constitution's prohibition against cruel punishments.

In addition, the vast majority of the Philadelphians who remain sentenced to execution are indigent members of racial minority groups, represented by "woefully" under-funded court-appointed trial counsel—many of whom have been found ineffective in at least one other capital case. Given the acknowledged inadequacy of the support and compensation historically provided to these court-appointed attorneys, it is difficult to ignore the connection between indigence, the quality of representation, and the racial composition of Philadelphia's death row.

Moreover, all of the currently sentenced Philadelphia defendants' cases remain in active, post-conviction litigation, calling into question whether they, too, will someday join the ranks of overturned death sentences.

In this brief, we first show how, as it has been applied, the death penalty violates the Pennsylvania Constitution's prohibition against cruel punishments. More specifically, we establish that (1) the Pennsylvania Constitution prohibits the unreliable and arbitrary imposition of the death penalty, and (2) the DAO study supports the conclusion that the death penalty has been imposed in an unreliable and arbitrary manner.

We then discuss how Pennsylvania's Constitution functions to prohibit the imposition of the death penalty independently of the United States Constitution. The United States Supreme Court has encouraged independent state constitutional analysis, and this Court has increasingly voiced a desire to define the contours of Pennsylvania's cruel punishments clause. Under the factors set forth in *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991), compelling reasons exist for the Court to render an independent state constitutional ruling here.

Finally, we demonstrate why this Court should exercise its King's Bench jurisdiction to consider the constitutionality of Pennsylvania's capital punishment system as administered. The structural problems with the death penalty are matters of great public importance that require timely intervention by this Court to avoid the

delays that would occur through the ordinary process of law. These problems implicate the health of the entire capital system. They are not well-suited to resolution on a case-by-case basis. Because of its supervisory power over Pennsylvania's judicial system, this Court is uniquely situated to address these issues.

ARGUMENT

I. As It Has Been Applied, The Death Penalty Violates The Pennsylvania Constitution's Prohibition Against Cruel Punishments.

Because of the unreliable manner in which it has been applied over many decades in Philadelphia, the DAO believes that the death penalty violates our state Constitution's prohibition against cruel punishment. As described in the preceding Statement of the Case, the DAO reviewed the 155 Philadelphia capital sentences imposed between 1980 and 2017. 112 of them have been overturned. A 72% error rate—often dependent on who represented the defendant—can fairly be described in one word: *unreliable*. As such, it is unconstitutional.

A. The Pennsylvania Constitution prohibits the unreliable and arbitrary imposition of the death penalty.

As this Court has observed, the administration of capital punishment warrants "the closest scrutiny." *See Commonwealth v. Murray*, 83 A.3d 137, 163 (Pa. 2013); *see also Commonwealth v. McKenna*, 383 A.2d 174, 181 (Pa. 1978) ("[I]t is imperative that the standards by which [a sentence of death] is fixed be constitutionally beyond reproach."). This is because the death penalty is unlike any other punishment or even any other action that a government can undertake with respect to an individual. *McKenna*, 383 A.2d at 181. Because death is final and irrevocable, a heightened degree of reliability is required. *See Woodson*, 428 U.S. at 305 (because of "its finality . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment");

Caldwell v. Mississippi, 472 U.S. 320, 340 (1985) (underlining the "heightened need for reliability" in capital sentencing); *Commonwealth v. Baker*, 511 A.2d 777, 788 (Pa. 1986) (same).

In 1972, the United States Supreme Court held that the death penalty, as it was then applied, violated the constitutional ban on "cruel and unusual punishments." *Furman*, 408 U.S. at 239-40.[17] Because each of the five justices voting to strike down the death penalty wrote for himself, there was no majority opinion. Nevertheless, all five agreed that the death penalty was unconstitutional because it was applied in an unreliable and arbitrary manner. *Id.* at 256, 274, 309-310, 313, 364.

As this Court subsequently recognized in *Commonwealth v. Bradley*, 295 A.2d 842, 845 (Pa. 1972), Pennsylvania's former capital sentencing statute did not pass the *Furman* test. This Court has also emphasized that "[a]ny challenge" to the capital sentencing scheme in Pennsylvania "must be evaluated in light of the requirements of *Furman*." *Commonwealth v. Pursell*, 495 A.2d 183, 196 (Pa. 1985). This means that "[t]otal arbitrariness and capriciousness" must be "eliminated" in

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[17] Federal standards are relevant to the state constitutional analysis. First, Eighth Amendment jurisprudence provides the minimum level of protection applicable to Article I § 13 of the Pennsylvania Constitution. *See Edmunds*, 586 A.2d at 894. Second, in determining the scope of Pennsylvania's cruel punishments clause, "an examination of related federal precedent may be useful . . . not as binding authority, but as one form of guidance." *Id.* at 895.

capital sentencing. *Id.*; *accord Graham v. Collins*, 506 U.S. 461, 468 (1993) ("[A]s *Furman* itself emphasized," states must "ensure that death sentences are not meted out 'wantonly' or 'freakishly.'").

In 1978, in the wake of *Furman*, Pennsylvania enacted a capital sentencing scheme designed to address the constitutional infirmities identified by the Court in *Furman*. To do so, our new statute identified specific factors that would permit a death sentence. The legislation also mandated automatic review of death sentences by an appellate court to ensure that they had not been handed out in an arbitrary fashion. 42 Pa.C.S. § 9711.

In *Commonwealth v. Zettlemoyer*, 454 A.2d 937, 969 (Pa. 1982), this Court determined that Pennsylvania's new capital-sentencing scheme fulfilled these constitutional requirements. There, this Court concluded that the legislature had "diligently attempted" to design a capital sentencing system that complied with federal and state constitutional requirements. *Id.* at 951. Based on the text of the statute, it appeared that the legislature had succeeded in establishing such a system. *Id.* at 949-51.

That conclusion was not unreasonable in 1982, when our courts had only four years of experience with the new statute. On the available information, there was no reason to believe that, in actual practice, the new capital sentencing scheme would produce unreliable and arbitrary results and so be unconstitutional.

Over forty years have passed since the enactment of Pennsylvania's current capital punishment scheme. We now possess decades of experience with modern-day capital punishment, particularly as it has been applied in the county that has produced the most death sentences. *See Commonwealth v. King*, 57 A.3d 607, 636 (Pa. 2012) (Saylor, C.J., specially concurring) (observing that Philadelphia has "far and away [been] the largest contributor to Pennsylvania's death row"). Based upon that experience, it is clear that Pennsylvania's capital punishment regime, as it has been applied in Philadelphia, is fatally flawed.

B. The DAO study supports the conclusion that the death penalty is applied in an unreliable and arbitrary manner.

In considering whether Pennsylvania's capital punishment system ensures reliability and eliminates arbitrariness, it is helpful to consider what a reliable, non-arbitrary sentencing scheme would look like. Such a system, at the very least, would be one in which a person who was convicted of first-degree murder would be sentenced to death solely because he or she was "the worst of the worst." *See Roper*, 543 U.S. at 568 ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'"); *Atkins*, 536 U.S. at 319 (the Supreme Court's death penalty jurisprudence "seeks to ensure that only the most deserving of execution are put to death").

In particular, such a system would ensure that individuals charged with a capital crime received competent representation, especially in the most critical stage of preparation and presentation of penalty-phase mitigation evidence. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (counsel cannot satisfy this obligation by relying upon "only rudimentary knowledge of [the defendant's] history from a narrow set of sources"); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel have an obligation to investigate thoroughly and prepare mental health and other mitigation evidence); *Commonwealth v. Crispell*, 193 A.3d 919, 951 (Pa. 2018) ("Trial counsel is obliged to obtain as much information as possible to prepare an accurate history of the client."); *Commonwealth v. Martin*, 5 A.3d 177, 206 (Pa. 2010) (same).

In such a system, an individual would be sentenced to death only after receiving a penalty hearing free of any significant error and only after a jury determined that the prosecution had proven beyond a reasonable doubt that there was at least one aggravating circumstance and that the aggravating circumstance(s) outweighed any mitigating ones. Counsel for indigent defendants would not be paid an inadequate flat fee, but would be compensated and supported in a way that incentivized doing a thorough job—both by conducting a detailed mitigation investigation and by adequately preparing the case with the client. It would additionally be a system in which this Court and its federal counterparts—the

ultimate guarantors of our constitutional rights—would not find themselves obligated to overturn the majority of the sentences imposed.

An arbitrary and unreliable capital sentencing scheme would, in many ways, be the complete opposite. For example, it would be one in which the persons who were sentenced to death did not receive that penalty because they were "the worst of the worst." Instead, whether one defendant received the death penalty and another did not would most often depend on whether that defendant received representation from a highly trained, adequately funded attorney or from a poorly supported court-appointed attorney compensated by an inadequate fixed fee, which, in fact, disincentivized the attorney from fully preparing and presenting critical mitigation evidence.

An arbitrary system might also be one where death sentence after death sentence would be overturned by reviewing courts due to ineffective assistance of counsel and, in particular, due to the failure to present mitigation evidence. *See King*, 57 A.3d at 636 (Saylor, C.J., concurring specially) (expressing inability "to agree with the suggestion that the presumption of effectiveness by and large reflects the actual state of capital defense representation in Pennsylvania"). It might be one in which scores of individuals who were originally sentenced to die would not only have their death sentences overturned, but would ultimately obtain a non-capital

disposition—often with the agreement of the very prosecutor who originally sought the capital sentence.

It might be a system in which the governor (the elected official responsible for signing and executing death warrants) would have such grave concerns about its fairness that he would impose a years-long moratorium. And it might be a system where the vast majority of the condemned were indigent members of a racial minority group, who were represented by "woefully" under-funded court-appointed attorneys.

As the DAO study demonstrates, Philadelphia's capital cases exemplify the above-described features of an arbitrary, unreliable death penalty system, including in the following ways:

1. The quality of court-appointed representation

The quality of representation—and in particular the quality of representation for indigent defendants—claims first notice. Reviewing courts have overturned nearly half of the 155 Philadelphia death sentences due to ineffective assistance of counsel. (DAO Appendix, Part I, Section A, Subsection One). Disturbingly, in half of these IAC cases, defense counsel was ineffective specifically because counsel failed to prepare and present a constitutionally acceptable mitigation defense. (DAO Appendix, Part I, Section A, Subsection Three). Court-appointed counsel represented the defendant in three out of four of these 74 IAC cases. (DAO

Appendix, Part I, Section A, Subsection Two). In most of these cases, the court-appointed attorney received an inadequate flat fee, which discouraged mitigation preparation and encouraged trials, even in situations where the chances for acquittal were minimal. Indeed, in 152 of the 155 capital sentences studied here (i.e., 98%), the defendant received a death sentence before the 2012 changes in Philadelphia's court-appointment fee structure. (DAO Appendix, Part III).

2. The non-capital resolution of the majority of cases

Equally characteristic of an unreliable and arbitrary system is the ultimate, non-capital outcome of most of the cases where a Philadelphia defendant received the death penalty. After reversal, the vast majority of these cases resulted in a non-capital disposition. (DAO Appendix, Part I, Section C). Often this non-capital disposition occurred with the agreement of the Commonwealth. (DAO Appendix, Part I, Section D). On average, these cases took 17 years to become non-capital, i.e., to end up where they would have been if the Commonwealth had never filed a death notice in the first place. (DAO Appendix, Part I, Section E). Most of those years were consumed in protracted, expensive, taxpayer-funded, post-conviction litigation.

3. The race of Philadelphia defendants currently on death row

No discussion of the death penalty can be complete without addressing the manner in which capital punishment disproportionately affects minorities and

particularly black people. In Philadelphia, less than 45% of the population is black.[18] Nevertheless, 37 of the 45 Philadelphia defendants on death row (82%) are black. Of the remaining eight, half are from other minority groups. (DAO Appendix, Part II, Section A).

Thus, 91% of the Philadelphia defendants currently on death row are members of a racial minority. Of these, 80% were indigent individuals represented by attorneys selected by the court. In 62% of these cases, the court selected an attorney who was found ineffective in at least one other capital case. Given the "woeful inadequacy" of the support and compensation historically provided to these court-appointed attorneys, it becomes difficult to deny the connection between indigence, the quality of representation, and the racial composition of Philadelphia's death row. *See Furman*, 408 U.S. at 364 (Marshall, J., concurring) ("[A] look at the bare statistics regarding executions is enough to betray much of the discrimination."). With respect to the application of the death penalty in Philadelphia, the "bare statistics" are equally troubling.

As the United States Supreme Court recently explained, "'[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice.'" *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). This is particularly true

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[18] U.S. Census Bureau, QuickFacts Philadelphia County, Pennsylvania, https://www.census.gov/quickfacts/philadelphiacountypennsylvania#qf-headnote-a (last visited June 17, 2019).

when it comes to the death penalty. Even the appearance of discrimination in such cases is intolerable because, to many citizens, the state's very legitimacy is called into question when it appears to single out one group more than any other for the imposition of this severest of all penalties. Given our nation's well-documented history of racial discrimination, any system that results in the state executing its black citizens at a rate well beyond that of any other group is one that should draw the highest scrutiny from this Court.

II. Article I, Section 13 Of The Pennsylvania Constitution Independently Prohibits The Imposition Of The Death Penalty.

Compelling reasons support a determination that Pennsylvania's cruel punishments clause, independently of the Eighth Amendment, prohibits the Commonwealth's capital sentencing regime, as it has been applied. "The United States Supreme Court has repeatedly affirmed that the states are not only free to, but also encouraged to engage in independent analysis in drawing meaning from their own state constitutions." *Edmunds*, 586 A.2d at 894. In addition, "decisions based on Pennsylvania's Declaration of Rights [of which the cruel punishments clause is a part] 'ensure[] future consistency in state constitutional interpretation, since federal law is always subject to change.'" *Commonwealth v. Molina*, 104 A.3d 430, 484 (Pa. 2014) (quoting *Commonwealth v. Lewis*, 598 A.2d 975, 979 n.8 (Pa. 1991)).

Moreover, this is not a case in which extending protections under the state Constitution would potentially hamper law enforcement by restricting the methods

used to conduct criminal investigations and requiring police officers to master distinctions between competing sets of state and federal procedural requirements. Rather, the death penalty is imposed long after the underlying investigation is concluded. Further, there is no concern as to whether the state constitutional claim at issue here has been properly preserved for review because it goes to the legality of sentence, and, as such, is not subject to waiver. *E.g., Commonwealth v. Batts*, 163 A.3d 410, 441 (Pa. 2017). Therefore, key considerations that might weigh against conducting an independent state constitutional analysis in other contexts are not implicated here.

To determine the individual rights that Pennsylvania's Constitution protects, courts consider the four factors set forth in *Edmunds*:

1. text of the Pennsylvania constitutional provision;
2. history of the provision, including Pennsylvania case law;
3. related case-law from other states;
4. policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence.

Edmunds, 586 A.2d at 895. As already noted, in some instances, "an examination of related federal precedent may be useful as part of the state constitutional analysis, not as binding authority, but as one form of guidance." *Id.*

Here, each of the four *Edmunds* factors weighs in favor of holding that, as it has been applied, capital punishment violates the Pennsylvania Constitution.

A. Textual differences between Article I Section 13 and the Eighth Amendment demonstrate that the state provision has independent force.

Pennsylvania's Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." Pa. Const. Art. 1 § 13. The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The difference in language was not coincidental.

The "cruel and unusual" language was proposed (but not yet adopted) for the federal Constitution *before* Pennsylvania's "cruel punishments" provision was enacted. Aware of the prior proposal to guarantee that neither "cruel nor unusual punishments [be] inflicted," Pennsylvania's constitutional framers chose to prohibit the less restrictive category of "cruel punishments." *See generally,* Brief of the Pennsylvania Prison Society and Legal Scholars as Amici Curiae. This supports the conclusion that Pennsylvania's provision has independent force and meaning. *See Commonwealth v. Cunningham*, 81 A.3d 1, 15 (Pa. 2013) (Castille, C.J., concurring) (noting textual differences between Article I § 13 and the Eighth Amendment), *overruled on other grounds*, *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016).

B. The history of the cruel punishments clause reveals that its independent application is appropriate here.

This Court has recognized that differences between the Eighth Amendment and Article I § 13 exist, and has increasingly sought to define the contours of our state's cruel punishments clause. *See, e.g.*, *Shoul v. Pa. Dep't of Transp.*, 173 A.3d 669, 682 n.13 (Pa. 2017) (noting distinctions between the Eighth Amendment and Article I § 13); *Commonwealth v. Eisenberg*, 98 A.3d 1268, 1283 (Pa. 2014) (stating that Article I § 13 and the Eighth Amendment should not proceed in lockstep); *Commonwealth v. Baker*, 78 A.3d 1044, 1053 (Pa. 2013) (Castille, C.J., concurring, joined by Saylor and Todd, JJ.) (same); *Cunningham*, 81 A.3d at 15, 17-18, 22 n.5 (Castille, C.J., concurring, and Baer, J., dissenting, joined by Todd and McCaffery, JJ.) (four justices express a willingness to consider argument based on the Pennsylvania Constitution's cruel punishments clause, but declining to do so because no party advanced the state constitutional argument in *Cunningham*).

Moreover, where separate state constitutional grounds for relief are presented, this Court conducts an independent state constitutional analysis. *Baker*, 78 A.3d at 1054-55 (Castille, C.J., concurring, joined by Saylor and Todd, JJ.) (noting instances both before and after *Edmunds* in which the Court conducted an independent state constitutional analysis under Article I § 13). Indeed, even if this Court determines that the federal and state provisions engender the same standard, independent analysis under the Pennsylvania Constitution is required: "two independent

jurisdictions, applying the same standard, easily could devise separate principles in application." *Id*. Thus, a state constitutional analysis is appropriate here.

The Court has never decided whether Article I Section 13 is coextensive with the Eighth Amendment in the context of an as-applied challenge to the death penalty. In contrast to the defendant in *Zettlemoyer*, Cox does not assert that the death penalty is *per se* unconstitutional. *See Zettlemoyer*, 454 A.2d at 967. Rather, Cox's petition raises only an as-applied challenge to the constitutionality of the death penalty.

In addition to Pennsylvania's historical stance on punishment generally, this Court has historically anticipated federal law in death penalty cases. Long before the United States Supreme Court decided *Furman* or the General Assembly enacted our current death penalty statute, this Court held that the imposition of the death penalty *requires* consideration of the defendant's individual personal characteristics, such as his youth, mental capacity, home environment, economic circumstances, and scholastic record. *Commonwealth v. Green*, 151 A.2d 241, 247-48 (Pa. 1959); *Commonwealth v. Irelan*, 17 A.2d 897, 898 (Pa. 1941). And, after *Furman*, this Court struck down the General Assembly's first attempt at a revised death penalty statute because, though no United States Supreme Court case had addressed an identical statute, the prior statute unduly restricted the mitigating evidence the jury could consider. *Commonwealth v. Moody*, 382 A.2d 442, 449 (Pa. 1977),

superseded by revised death penalty statute, Act of July 9, 1976, P.L. 586, No. 142, effective June 27, 1978. This history supports independent consideration here.

C. Related case law from other states demonstrates the propriety of independent state constitutional limits on death penalty regimes.

Twenty-one states and the District of Columbia have abolished the death penalty, and four more currently have death penalty moratoria in place. Of Pennsylvania's immediate neighbors, New York, New Jersey, Delaware, Maryland, and West Virginia prohibit the death penalty. All of the other northeastern states—Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut—do the same. Of the states that have abolished the death penalty, three state supreme courts (Massachusetts, Washington, and Connecticut) have held that the death penalty violates their state constitutions for reasons instructive here.[19]

The Massachusetts Supreme Judicial Court held that it was "inevitable that the death penalty will be applied arbitrarily," and that "experience has shown that

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[19] Other state supreme courts have invalidated their state death penalty schemes on other grounds. *Rauf v. State*, 145 A.3d 430 (Del. 2016) (death penalty statute violated Sixth Amendment by allowing sentencing judge, rather than jury, to find an aggravating factor); *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (death penalty statute violated state constitution because it impermissibly required judges to instruct juries that if they deadlocked on whether to impose death, defendant would be eligible for parole within 20 to 25 years); *State v. Cline*, 397 A.2d 1309 (R.I. 1979) (death penalty statute that made death mandatory for murder committed by inmate violated Eighth Amendment because it did not allow for consideration of mitigating factors).

the death penalty will fall discriminatorily upon minorities, particularly blacks." *District Attorney for Suffolk District v. Watson*, 411 N.E.2d 1274, 1283 (Mass. 1980). Notably, although Massachusetts' constitution prohibits "cruel *or* unusual punishments," the court based its ruling on the cruel punishment prohibition. *Id.* at 1281.

The court held that "arbitrariness in sentencing will continue even under the discipline of a post-*Furman* statute like the one" it was considering. *Id.* at 1284. The court reasoned that the federal constitutional requirements constrain only "certain aspects of jury discretion." *Id.* at 1285. They "do not address the discretionary powers exercised at other points in the criminal justice process. Power to decide rests not only in juries but in police officers, prosecutors, defense counsel, and trial judges." *Id.* Because it determined that the death penalty was inevitably applied arbitrarily, the Massachusetts Supreme Judicial Court held the death penalty to be unconstitutional under its state constitution.

Washington also recently held that its state constitution barred the death penalty as applied. *State v. Gregory*, 427 P.3d 621, 633 (Wash. 2018). Like Pennsylvania's, Washington's constitution prohibits "cruel" punishments. Based on a statistical study showing that the death penalty was applied significantly more frequently to black defendants than non-black defendants, the court held that Washington's death penalty was administered in an arbitrary, capricious, and

racially biased manner. *Id.* at 635. Therefore, the court held that it did not comply with the "'evolving standards of decency that mark the progress of a maturing society.'" *Id.* (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

In Connecticut, the state supreme court reviewed existing death penalties after the legislature abolished future death penalties. *State v. Santiago*, 122 A.3d 1, 9 (Conn. 2015). Connecticut's constitution contains no explicit cruel and unusual punishments clause, but the court recognized as "settled constitutional doctrine that both of [Connecticut's] due process clauses prohibit governmental infliction of cruel and unusual punishments." *Id.* at 14. The court held, "following its prospective [legislative] abolition, this state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose." *Id.* at 10.

These state court decisions support this Court considering whether Pennsylvania's death penalty, as applied, comports with the Article I Section 13's cruel punishments clause and determining that it does not.

D. Policy considerations demonstrate that a state constitutional ruling is essential to determine the validity of the death penalty as applied.

An independent state constitutional ruling is the only way to protect against the arbitrary and unreliable application of the death penalty in Pennsylvania. This is in part because the United States Supreme Court's Eighth Amendment

jurisprudence has been constrained by federalism concerns. *Rummel v. Estelle*, 445 U.S. 263, 282 (1980) (declining to invalidate on Eighth Amendment grounds Texas' sentencing scheme imposing a life sentence for three minor theft offenses due to federalism concerns); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973) ("Questions of federalism are always inherent in the process of determining whether a state's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.").

As the Court explained in *Rummel*, even the harshest sentencing statute in the country might not violate the Eighth Amendment, because "our Constitution 'is made for people of fundamentally differing views.' . . . Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Rummel*, 445 U.S. at 282. Federalism concerns also formed part of the basis for the Court's holding in *Gregg v. Georgia*, 428 U.S. 153, 186-87 (1976), that the Eighth Amendment does not categorically prohibit the death penalty. Thus, Eighth Amendment law has evolved to provide the lowest base level of protection, and to permit wide discretion among the states to determine the appropriateness of punishment within that minimal limit.

This Court, in interpreting Pennsylvania's own Constitution, is not saddled with this federalism constraint. Indeed, as discussed above, the opposite is true—

the trend is towards increased state constitutional analysis (the "New Federalism") to protect individual rights. *Edmunds*, 586 A.2d at 894-95; *Molina*, 104 A.3d at 484.

Such independent state constitutional protection is essential here, where the federal constitutional landscape has developed in such a way as to set the lowest bar on the harshest and only irreversible penalty, and so to tolerate the unreliability and arbitrariness produced by Pennsylvania's capital system. Indeed, in the recent aftermath of *Furman*, the United States Supreme Court reviewed several revised statutory schemes similar to Pennsylvania's and held them to be constitutional under the Eighth Amendment. *Gregg v. Georgia*, 428 U.S. at 206-07; *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976); *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

As detailed above, the DAO study of Philadelphia capital cases reveals that the majority of death sentences imposed between 1978 and 2017 have been overturned. Those stark numbers show that the integrity of the system as a whole has been compromised for decades. The Philadelphia death sentences that remain were imposed under that same system, even with many of the same counsel previously deemed ineffective. All of those cases are still in active post-conviction review. Review here would allow the Court to determine whether our state Constitution can tolerate a system that exposes people to the harshest penalty available where years' worth of data has shown that penalty to be unreliably and arbitrarily applied.

III. This Court Should Exercise Its King's Bench Jurisdiction To Consider The Constitutionality Of The Administration Of The Death Penalty In Pennsylvania.

"King's Bench authority is generally invoked to review an issue of public importance that requires timely intervention by the court of last resort to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Williams*, 129 A.3d at 1206 (citing *In re Bruno*, 101 A.3d at 670). This is such a case.

A. King's Bench jurisdiction is appropriate to address systemic challenges to the administration of justice such as this.

Where problems implicating the judicial system beyond a single case or controversy have arisen in the past, this Court has exercised its King's Bench power to rectify those systemic challenges. Two such challenges in fact have involved problems with the death penalty. *See Williams*, 129 A.3d at 1206-07 (exercising King's Bench jurisdiction to review death penalty moratorium where petition raised "a forceful challenge to the integrity of the judicial process"); *Commonwealth v. McGarrell*, 77 E.M. 2011 (Lerner Report) (exercising extraordinary jurisdiction to consider challenge to Philadelphia's system for compensating capital indigent defense counsel); *see also Philadelphia Cmty. Bail Fund v. Bernard, et al.*, 21 EM 2019 (Pa. July 8, 2019) (exercising King's Bench jurisdiction to review alleged systemic failures in administering cash bail in Philadelphia); *In re J.V.R.*, 81 MM 2008 (Pa. Feb. 11, 2009) (per curiam) (exercising King's Bench jurisdiction over the

"kids for cash" scandal); *In re Bruno*, 101 A.3d at 673-75 (listing cases in which the Court exercised King's Bench jurisdiction to "conscientiously guard the fairness and probity of the judicial process and the dignity, integrity, and authority of the judicial system").

This case likewise challenges the "dignity, integrity, and authority of the judicial system." A review of the administration of Pennsylvania's death penalty system as a whole is peculiarly within the province of this Court, given this Court's supervisory role over the judicial system. Pa. Const. Art. V § 10(a) ("The Supreme Court shall exercise general supervisory and administrative authority over all the courts."); *id.* § 10(c) ("The Supreme Court shall have the power to . . . provide for . . . the administration of all courts and supervision of all officers of the Judicial Branch[.]"). "As part of its administrative responsibility, the Court oversees the daily operations of the entire Unified Judicial System, which provides a broad perspective on how the various parts of the system operate together to ensure access to justice, justice in fact, and the appearance that justice is being administered even-handedly." *In re Bruno*, 101 A.3d at 664. "In short, King's Bench allows the Supreme Court to exercise authority commensurate with its 'ultimate responsibility' for the proper administration and supervision of the judicial system." *Id.* at 671.

The problems identified by the DAO study of the 155 Philadelphia death penalty cases raise important questions regarding many facets of the judicial system,

including the availability of and funding for quality defense representation, and racial bias within the system. Such potential structural flaws could not be apparent through the review of individual PCRA and appellate cases—indeed, such piecemeal review by definition would miss the forest for the trees. This Court, as the ultimate supervisor of the system, is best positioned to address this broad challenge to the administration of justice in the Commonwealth. *Cf. Commonwealth v. Onda*, 103 A.2d 90, 92 (Pa. 1954) (the exercise of King's Bench jurisdiction is especially appropriate where it provides the only adequate remedy).[20]

B. King's Bench jurisdiction is appropriate in cases that require timely intervention such as this.

King's Bench jurisdiction is appropriate for the additional reason that the petition requires "timely intervention . . . to avoid the deleterious effects arising from delays incident to the ordinary process of law." *Williams*, 129 A.3d at 1206. The questions presented here have compromised our capital punishment system for too long. Even as early as 2003, this Court's Committee on Racial and Gender Bias concluded that there were "strong indicators that Pennsylvania's capital justice

[20] Alternatively, the Court could exercise its extraordinary jurisdiction under 42 Pa.C.S. § 726. Petitioners note that they, along with several other death row inmates, have filed PCRA petitions raising these claims in the lower courts. *See* Petitioner's Brief at 5 n.3. However, the essence of this action is a broad challenge to the system as a whole. Therefore, King's Bench jurisdiction is likely the more appropriate vehicle to address this challenge. *See Williams*, 129 A.3d at 1207 n.11.

system does not operate in an evenhanded manner." *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Judicial System* 201 (March 2003).

This Court's review is urgent for the additional reason that the unreliability of Pennsylvania's capital punishment system, and the years (even decades) of appellate and post-conviction proceedings it produces, exact a harsh toll on victims' families. As *amici curiae* Murder Victims Family Members explain, given the high reversal rate of Pennsylvania's death sentences, "in almost all cases, [the death penalty] is a hollow promise of a resolution that will never come." Brief of Murder Victims, at 22.

C. King's Bench jurisdiction is appropriate because no additional fact-finding is necessary.

Additional fact-finding in the lower courts is unnecessary for this Court to decide this case. The results of the DAO study of the 155 Philadelphia death sentences imposed between 1978 and 2017 are verifiable matters of public record. The facts in the Joint State Government Commission (JSCG) Report illustrating these same phenomena statewide are likewise verifiable in public court records. This Court has previously relied upon bipartisan, bicameral reports generated by the JSGC—the research agency of the General Assembly, "for the development of facts and recommendations." *See, e.g., Zauflik v. Pennsbury Sch. Dist.*, 104 A.3d 1096, 1121 (Pa. 2014) (noting that Pennsylvania's Tort Claims Act was passed after JSGC

Task Force conducted detailed study and issued report and recommendations); *Commonwealth v. Galloway*, 574 A.2d 1045, 1048 & n.1 (Pa. 1990) (looking to JSGC Task Force final report on Office of the Attorney General to determine breadth of Commonwealth Attorneys Act); *Commonwealth v. Carsia*, 517 A.2d 956, 958 (Pa. 1986) (same).

Remand to the PCRA court at this point would only waste judicial resources and indefinitely delay the resolution of this matter. Therefore, the DAO respectfully requests that the Court exercise its King's Bench jurisdiction over this matter.

CONCLUSION

Because the death penalty has repeatedly been handed out in an unreliable and arbitrary manner, it cannot survive the state Constitution's ban on cruel punishments. The DAO respectfully requests this Court to exercise its King's Bench or extraordinary jurisdiction and hold that the death penalty, as it has been applied, violates the Pennsylvania Constitution's ban on cruel punishments.[21]

Dated: July 15, 2019

Respectfully submitted,

/s/ Lawrence S. Krasner

JOANNA H. KUNZ
Assistant District Attorney
GRADY GERVINO
Assistant District Attorney
MICHAEL ERLICH
Assistant District Attorney
PAUL M. GEORGE
Assistant Supervisor, Law Division
NANCY WINKELMAN
Supervisor, Law Division
LAWRENCE S. KRASNER
District Attorney of Philadelphia[22]

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[21] The DAO gratefully acknowledges the substantial contributions of our colleagues, Diane Adamchak, Michael Hollander, Wes Weaver, and Henry Woods in the preparation of this Brief, its graphics, and the Appendix.

[22] First Assistant District Attorney Carolyn Temin was a member of the Advisory Committee to the June 2018 Joint State Government Commission Report on Capital Punishment in Pennsylvania. In accordance with the DAO's Conflict Resolution Protocol, First Assistant Temin has been screened from all participation in this matter.

CERTIFICATION OF COMPLIANCE WITH RULE 2135

Pursuant to Rule 2135 of the Pennsylvania Rules of Appellate Procedure, I certify that, based on a word count by the word processing system used to prepare it, Respondent's brief contains less than 14,000 words, exclusive of the cover of the brief and the pages containing the table of contents, tables of citations, proof of service, and any addendum.

/s/ *Paul M. George*____________
Paul M. George
Assistant Supervisor, Law Division

CERTIFICATION OF SERVICE

I, Paul M. George, hereby certify that on this 15th day of July, 2019, I filed the foregoing *Respondent's Brief* through the Court's PACFile electronic filing system and thereby served the following:

Shawn Nolan
Timothy Kane
Stuart Lev
Helen Marino
Federal Community Defender Office
Suite 545 West, The Curtis Center
601 Walnut St.
Philadelphia, PA 19106-3314
(215) 928-0520
shawn_nolan@fd.org
timothy_kate@fd.org
stuart_lev@fd.org
Counsel for Petitioner, *Jermont Cox*

Joshua D. Shapiro
Ronald Eisenberg
Hugh J. Burns, Jr.
Amy Zapp
Office of the Pennsylvania Attorney General
Strawberry Sq. Fl. 15
Harrisburg, PA 19120
(717) 705-3833
josh@attorneygeneral.gov
azapp@attorneygeneral.gov
Counsel for the Respondent, *Commonwealth of Pennsylvania*

Mary Catherine Roper
Nyssa E. Taylor
American Civil Liberties Foundation of Pennsylvania
P.O. Box 60173
Philadelphia, PA 19102
(215) 592-1513
mroper@aclupa.org
ntaylor@aclupa.org
Counsel for ACLU of Pennsylvania, Amicus Curiae

Witold J. Walczak
American Civil Liberties Union of Pennsylvania
247 Fort Pitt Boulevard
Pittsburgh, PA 15222
(412) 901-0290
vwalczak@aclupa.org
Counsel for ACLU of Pennsylvania, Amicus Curiae

Marc Bookman
Atlantic Center for Capital Representation
1315 Walnut St. Suite 1331
Philadelphia, PA 19107
(215) 732-2227
mbookman@atlanticcenter.org
Counsel for Atlantic Center for Capital Representation, Amicus Curiae

Brian T. Feeney
Greenberg Traurig, LLP
2700 Two Commerce Square
2001 Market St.
Philadelphia, PA 19103
(215) 988-7812
feeneyb@gtlaw.com
Counsel for The Innocence Network and Witness to Innocence, Amici Curiae

Farbod Faraji
Jessica L. Hunter
Lawrence S. Lustberg
Gibbons P.C.
One Gateway Center
Newark, NJ 07102
(973) 596-4500
jhunter@gibbonslaw.com
Counsel for Justices, Judges, and Prosecutors, Amici Curiae

Marsha L. Levick
Juvenile Law Center
1315 Walnut St. Suite 400
Philadelphia, PA 19107-4719
(215) 625-0551
mlevick@jlc.org
Counsel for Juvenile Law Center and Youth Sentencing and Reentry Project, Amici Curiae

David Richman
Pepper Hamilton, LLP
3000 Two Logan Sq.
Philadelphia, PA 19103-2799
(215) 981-4412
richmand@pepperlaw.com
Counsel for NAACP Legal Defense & Educational Fund, Inc., Amicus Curiae

Quintes D. Taglioli
Markowitz & Richman
121 N. Cedar Crest Blvd. Fl.2
Allentown, PA 18104
(610) 820-9531
qdtaglioli@markowitzandrichman.com
Counsel for Pennsylvania Lodge Fraternal Order of Police, Amicus Curiae

Jennifer Allison Merrigan
Phillips Black, Inc.
1901 S. 9th St. 510
Philadelphia, PA 19148
(816) 695-2214
j.merrigan@phillipsblack.org
Counsel for The Pennsylvania Prison Society and Legal Scholars, Amici Curiae

Jules Epstein
Temple University Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122
(215) 204-6288
Counsel for Social Scientists and Researchers Catherine M. Grosso, Jules Epstein, et al., Amici Curiae

I further certify that I served the following via First Class Mail:

Anna Arceneaux
Cassandra Stubbs
ACLU Capital Punishment Project
201 W. Main Street
Durham, NC 27701
(919) 682-5659
aarceneaux@aclu.org
cstubbs@aclu.org
Counsel for ACLU Capital Punishment Project, Amicus Curiae

Keith Hammeran
Caroline Heller
Greenberg Traurig, LLP
MetLife Building
200 Park Ave.
New York, NY 10166
(212) 801-2165
Counsel for The Innocence Network and Witness to Innocence, Amici Curiae

Elliot H. Scherker
Greenberg Traurig, P.A.
333 Southeast Second Ave.
Miami, FL 33131
(305) 579-0500
Counsel for The Innocence Network and Witness to Innocence, Amici Curiae

Justin Anderson
Ayelet Evrony
Carter Greenbaum
Mary Spooner
Paul, Weiss, Rifkind, Wharton & Garrison, L.L.P.
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3916
Counsel for Murder Victims' Family Members, Amici Curiae

John R. Mills
Phillips Black, Inc.
836 Harrison St.
San Francisco, CA 94107
Counsel for the Pennsylvania Prison Society and Legal Scholars, Amici Curiae

David Rudovsky
Kairys, Rudovsky, Messing, Feinberg & Lin, LLP
718 Arch St. Suite 501
Philadelphia, PA 19106-1530
(215) 925-4400
davidrudovsky@krlawphila.com
Counsel for The Pennsylvania Prison Society and Legal Scholars, Amici Curiae

Catherine M. Grosso
Michigan State University College of Law
648 N. Shaw Lane #417
East Lansing, MI 48824
(517) 432-6962
Counsel for Social Scientists and Researchers Catherine M. Grosso, Jules Epstein, et al.

Date: July 15, 2019

/s/ Paul M. George
Paul M. George
Assistant Supervisor, Law Division